

Board of Contract Appeals

General Services Administration

Washington, D.C. 20405

January 28, 1998

FAA Docket No. 97-ODR-00054

(GSBCA 14417-FAA)

COOPER CONSTRUCTION, INC.

v.

FEDERAL AVIATION ADMINISTRATION.

Lawrence J. Sklute of Sklute & Associates, Washington, DC, counsel for
Cooper Construction, Inc.

William K. Tolar, Office of Regional Counsel, Federal Aviation
Administration, Department of Transportation, Forth Worth, TX, counsel for
Federal Aviation Administration.

Before Board Judge Goodman, acting as Special Master to Office of Dispute Resolution for Acquisition, Federal Aviation Administration.

On November 13, 1997, protester, Cooper Construction, Inc. (Cooper) filed this pre-award protest with the Federal Aviation Administration (FAA) Office of Dispute Resolution for Acquisition (ODR) with regard to solicitation number DTFA07-97-R-03280 (the solicitation). After initial evaluation of Cooper's protest, the FAA ODR referred the protest to a Special Master, a Board Judge of the General Services Administration Board of Contract Appeals (GSBCA). The parties elected to have the protest resolved on the written record, without a hearing, and have filed briefs and supporting documents. For the reasons set forth below, the Special Master recommends that the protest be denied.

Findings of Fact

1. The solicitation is for construction and modernization of the initial sector suite system, display system replacement, automation wing rehabilitation, and rest room modifications at the Air Route Traffic Control Center (ARTCC), Albuquerque, New Mexico. The solicitation was sent via Federal Express on October 7, 1997, to Cooper and other contractors. The original time and date set for receipt of offers was 4:00 p.m. central standard time (CST) on November 6, 1997. Exhibit 2.

2. Section M of the solicitation reads as follows:

Evaluation Factors for Award

M-1 Basis of Award.

The Government may award a contract on the basis of initial offers received, without discussion. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. Award shall be in accordance with paragraph C of 3.2.2.3-19, Contract Award.

Exhibit 2.

3. Section L of the solicitation contains the following language:

3.2.2.3-19 CONTRACT AWARD (APRIL 1996)

(a) The Government will award a contract resulting from this Screening Information Request (SIR) to the responsible offeror whose submittal conforming to the SIR will, at the discretion of the source selection official, be the best value to the FAA considering the technical, cost/price, and other criteria in the SIR.

(b) The Government may (1) reject any or all submittals if such action is in the public interest, (2) accept other than the lowest cost/price submittal, and (3) waive informalities and minor irregularities in offers received.

(c) The Government intends to evaluate submittals and award a contract, either on initial submittals without communications, or on initial or subsequent submittals with communications. In evaluating the submittals, the Government may conduct written or oral communications with any and/or all offerors, and may down-select the firms participating in the competition to only those offerors most likely to receive award. A submittal in response to an [sic] SIR should contain an offeror's best terms from a cost or price and technical standpoint.

Exhibit 2.

4. The solicitation contains detailed design specifications for the work required and does not contain technical evaluation criteria. Neither protester nor the agency assert that the solicitation contains technical evaluation criteria.

5. Amendment A001 to the solicitation was issued by the FAA on November 4, 1997, and extended the time and date set for receipt of offers to 4:00 p.m. CST on November 13, 1997. As part of Amendment A001, the contracting officer responded to questions from various contractors regarding the solicitation. Cooper asked the following question, to which the contracting officer responded:

Question: Section M-1 states each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. 3.2.2.3-19 states at the discretion of the source selection official be [sic] the best value to the FAA considering the technical, cost/price and other criteria in the SIR.

Please explain first, technical standpoint and how that relates to this solicitation. Second be the best value to the FAA considering the technical, cost/price. Since we are not preparing a technical proposal and just submitting a price, how does this relate to this solicitation, or does best value mean low price.

Response: Technical standpoint would be how each of the offerors stand with regard to the technical criteria rating plan if one was included in the SIR (solicitation). Best value to the Government would be based on technical (if the solicitation included a technical rating criteria and the offerors were given position placement based on this criteria,) then cost/price best value would be looked at with regard to the offerors proposal, along with the offerors expertise, etc. If the SIR does not call for technical criteria, then normally the award would be based on the lowest responsible offer. But, the Government always reserves the right to enter into negotiations with contractors who provide us an offer and during that negotiation we could ask for information deemed appropriate by the Integrated Product Team concerning technical criteria, breakdown of offers, etc. to assure that the Federal Aviation Administration was receiving the best value. This clause is a standard one and as such, not every solicitation is going to utilize the entire clause meaning (i.e. we may/may not require technical criteria, we may/may not utilize the lowest offer, etc.)

FAA Brief, Attachment B.

6. On November 13, 1997, prior to the time set for receipt of offers, Cooper filed a protest with the FAA ODR containing five bases of protest. Protest Complaint. Three of the five bases of protest were withdrawn after the protest complaint was filed.

7. The Government received two offers in response to the solicitation. Cooper did not submit an offer.

8. The two offers were evaluated by the Integrated Product Team (IPT) in a procurement evaluation meeting on November 15, 1997. A memorandum of the same date reads as follows:

Two offers were received for the project and they were very close in price. The difference in price between the two is only approximately \$550,000. The lowest offer was only \$51,700 higher than the Government Estimate. The low offeror has done many projects for the Government and quite a few of them were projects at the Air Route Traffic Control Centers. They currently have a contract they are doing with regard to renovations to the Automation Wing at our Fort Worth, TX facility. The low bidder has also familiarized himself with a control room environment at this Center and has performed interior finishes and other associated work which has allowed him to become familiar with the scope of work for the Albuquerque project.

This contractor has also done the bathroom renovation work at the Fort Worth Center which is identical in scope to the work at this Albuquerque Center.

The low offeror has completed all projects he has had with the F.A.A. to the Government's satisfaction. All work associated with the AWRI renovation at the Fort Worth Center which was completed by this contractor contained critical milestones and varying time frames similar to this Albuquerque project. In fact, this contractor met and exceeded the requirements ahead of schedule.

Overall, the IPT feels that it is in the best interest of the Government to award this contract to the low offeror based on the above information. Based on the reasonableness of the proposals, and the fact that both offerors were on our qualified vendor list and deemed responsible to do Government work, the IPT has advised the Source Selection Official to award the contract to the low offeror

Exhibit 5 at 2. This memorandum was signed by Gail F. Smith, Contracting Officer and Source Selection Official, Luis Flores, Construction Coordinator, and Juan Romero, Lead Engineer. Id.

9. Another memorandum was issued by the IPT dated November 24, 1997. It reads as follows:

Source Selection Official(SS)(Gail F. Smith) decision based on IPT Evaluation findings was that award should be and was made to [the low offeror].

Both offers were above the Government Estimate but still reasonable. The lowest offeror was only \$51,272 higher than the Government Estimate which is reasonable compared to the overall contract price which is \$6M plus.

Discussions were not conducted with offerors as it was felt that the low offer was comparably close to the Government Estimate, the contractor was very familiar with doing work at our Air Route Traffic Control Centers, he was on our qualified vendor list, has proven that he can do the work, can complete projects on time, and works very well with Government representatives.

After careful consideration of the offers, the award of contract was made based on the best value to the Government with regard to price.

Exhibit 5 at 1. This memorandum was signed by George Ramsey, Contracting Officer (in the absence of Gail F. Smith), Luis Flores, Construction Coordinator, and Juan Romero, Lead Engineer. Id.

10. On January 22, 1998, the Board issued the following inquiry to the agency:

The Integrated Products Team (IPT) memorandum dated November 15, 1997, contains information concerning the low offeror which the protester has characterized as "technical factors" (protester's brief at page 5-7).

Please explain how and when the IPT received this information.

11. The agency's response to the Board's inquiry reads, in relevant part:

The additional information concerning [the low offeror], discussed at the IPT meeting of November 15, 1997, was merely a collection of the personal knowledge, acquired over time, by each individual member of the IPT through their individual dealings with [the low offeror] on other agency projects. That information was known to one or more of the individual IPT members prior to the date [the] Solicitation . . . was issued and was not solicited from [the low offeror] or from any other contractor.

The discussions at the IPT meeting were nothing more than the final responsibility determination by the IPT that the low offeror, and apparent bid winner, met applicable general and specific standards. Further, had Cooper made an offer . . . and been the apparent low bidder, any personal knowledge of past dealings with Cooper would also have been discussed at that meeting in determining whether it met general and specific standards.

Agency Response to Board Inquiry (Jan. 23, 1998).

Discussion

Protester asserts that because no technical factors were stated in the solicitation, offerors could not intelligently respond to the proposal, full and fair competition could not be achieved, and the failure to include technical evaluation factors violated requirements of the solicitation and the FAA's Acquisition Management System (AMS). Protester further asserts that the solicitation was defective, ambiguous, and contains two inconsistent evaluation schemes. Finally, protester asserts that the agency considered unstated technical evaluation factors during the evaluation of offers.

The agency's position is that it was not required to include technical evaluation criteria in the solicitation, nor did it consider unstated technical evaluation criteria during evaluation of offers. The agency asserts that contract award was properly made after the receipt and evaluation of offers to the lowest- priced, responsible offeror, without discussions, and that those factors which protester characterizes as "technical evaluation factors" were considered in making the final responsibility determination.

First basis of protest

Protester's first basis of protest is as follows:

Section M fails to inform the offerors of the technical evaluation factors that the FAA will consider as part of its evaluation of offers. Section M.1 , entitled "Basis of Award," states:

The Government may award a contract on the basis of initial offers received, without discussion. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. Award shall be in accordance with paragraph C of 3.2.2.3-19.

(emphasis added). However, nowhere does the solicitation state the technical evaluation criteria. Therefore, offerors cannot intelligently prepare proposals, and full and fair competition will not be achieved. Thus, the FAA violated Contract Clause 3.2.2.3-19. Additionally the FAA violated Acquisition Management System (AMS) 3.2.2.3.1.2.3, 3.3.1.3.7, 3.2.2.2, 3.2.2.3.1.2.1. Since the FAA has failed to establish and disclose the technical criteria to offerors, the FAA should amend the RFP to allow offerors, such as CCI, to properly prepare proposals and a fair opportunity to compete.

Protest Complaint at 3.

Protester and the agency agree that no technical evaluation factors were stated, Finding 4, but disagree as to whether a statement of such factors was required. Cooper contends that because Section M uses the term "technical standpoint," this implies that technical evaluation factors must be stated. Cooper contends further that because the solicitation fails to inform offerors of the technical factors that the FAA would consider as part of its evaluation of offers, offerors cannot intelligently prepare proposals.

Cooper therefore requested clarification prior to the time that offers were due:

Please explain first, technical standpoint and how that relates to this solicitation. Second be [sic] the best value to the FAA considering the technical, cost/price. Since we are not preparing a technical proposal and just submitting a price, how does this relate to this solicitation, or does best value mean low price.

Finding 5.

It is clear from Cooper's inquiry that it did not read the solicitation to contain any technical evaluation criteria, as Cooper stated that it was not preparing a technical proposal but only a price proposal.

The contracting officer's response to Cooper's inquiry reads as follows:

Technical standpoint would be how each of the offerors stand with regard to the technical criteria rating plan if one was included in the SIR (solicitation). Best value to the Government would be based on technical (if the solicitation included a technical rating criteria and the offerors were given position placement based on this criteria,) then cost/price best value would be looked at with regard to the offerors proposal, along with the offerors expertise, etc. If the SIR does not call for technical criteria, then normally the award would be based on the lowest responsible offer. But, the Government always reserves the right to enter into negotiations with contractors who provide us an offer and during that negotiation we could ask for information deemed appropriate by the Integrated Product Team concerning technical criteria, breakdown of offers, etc. to assure that the Federal Aviation Administration was receiving the best value. This clause is a standard one and as such, not every solicitation is going to utilize the entire clause meaning (i.e. we may/may not require technical criteria, we may/may not utilize the lowest offer, etc.)

Finding 5.

The solicitation language in question and the contracting officer's response to protester's inquiry could certainly have been better written. Even so, neither protester nor the agency read the solicitation as containing technical evaluation criteria, and the contracting officer explained this in the response to protester's inquiry. I find that the contracting officer's response was sufficiently clear to put a reasonable prospective offeror on notice that, in this procurement, award would be made to the lowest priced responsible offeror.[5]

When reading a statement in its entirety, one must give meaning to all the words. The first three sentences of the response are clearly conditioned by the word "if." The third sentence of the response clearly states that if the SIR does not call for technical criteria, which in this instance it did not, Finding 4, then normally "the award would be based on

the lowest responsible offer." The remainder of the response, which references the possibility of requests for additional information during negotiation after submission of offers, is applicable to a situation which did not occur, as the contract was awarded without discussions. Finding 9.

There is no requirement that the SIR must contain technical evaluation criteria. The contract clauses and the sections of the FAA's AMS cited by protester do not require the inclusion of such technical evaluation criteria. The solicitation contained detailed design specifications, Finding 4, for the work required under the construction contract. It is not unusual for such solicitations to be evaluated solely on price-related factors without technical evaluation.

Protester contends that the solicitation was defective because even though it did not contain technical evaluation criteria, the IPT team considered unstated technical evaluation factors in their award determination, as demonstrated by the team's memoranda dated November 15 and 24, 1997. Protester's Brief at 5-7; see Findings 8, 9.

The agency asserts that the information considered was:

a collection of the personal knowledge, acquired over time, by each individual member of the IPT through their individual dealings with [the low offeror] on other agency projects. That information was known to one or more of the individual IPT members prior to the date [the] Solicitation . . . was issued and was not solicited from [the low offeror] or from any other contractor. The discussions at the IPT meeting were nothing more than the final responsibility determination by the IPT that the low offeror, and apparent bid winner, met applicable general and specific standards.

Finding 11.

The FAA AMS requires an affirmative determination of offeror responsibility before award of a contract, with consideration of stated factors. AMS 3.2.2.7.2 reads, in relevant part:

The CO shall ensure that contracts are awarded only to responsible contractors (See Section 3.2.2.2). No award shall be made unless the CO makes an affirmative determination of responsibility.

FAA AMS 3.2.2.2 referenced above reads, in relevant part:

Awards shall be made to responsible contractors only. To be determined responsible, a prospective contractor must:

- have adequate resources (financial, technical, etc.) to perform the contract, or the ability to obtain them;

- be able to comply with the required or proposed delivery or performance schedule, considering all existing business commitments;

- have a satisfactory performance record;

- have a satisfactory record of integrity and business ethics;
and

- be otherwise qualified and eligible to receive an award under applicable laws and regulations.

I find the agency's explanation credible, that the information considered was within the personal knowledge of the individual members of the IPT and considered as the basis for an affirmative responsibility determination. The subject matter of the information considered with regard to the lowest priced offeror was within the factors required to be considered for an affirmative determination of offeror responsibility.

This affirmative determination of responsibility which considered the above factors is memorialized in the pre-award memorandum of the IPT and referenced again in a subsequent memorandum. Findings 8, 9.

In summary, there was no requirement that technical evaluation factors be stated, nor did the agency consider unstated technical evaluation factors in evaluating the offers received. The agency awarded the contract to the lowest priced responsible offeror, without discussions. Finding 9. It ascertained that the low offer was reasonable in relation to the Government's estimate. Finding 8. In order to award to the lowest priced

responsible offeror, the FAA then made an affirmative determination that the contractor was responsible. Findings 8-10.

I recommend that the first basis of protest be denied.

Second basis of protest

Protester's second basis of protest is as follows:

CCI previously requested the Contracting Officer to state the technical criteria. On or after 6 November 1997, CCI received the Contracting Officer's response, which is not, in any way, tailored to the instant procurement. In deed [sic], it causes more confusion. The Contracting Officer stated:

A technical standpoint would be how each of the offerors stand with regard to the technical criteria rating plan if one was included in the SIR (solicitation). Best value to the Government would be based on technical (if the solicitation included a technical rating criteria and the offerors were given position placement based on this criteria,) then cost/price best value would be looked at with regard to the offerors proposal, along with the offerors expertise, etc. **If the SIR does not call for technical criteria, then normally the award would be based on the lowest responsible offer.**

(emphasis added). Based on the Contracting Officer's response, CCI protests the following matters:

A. Since the solicitation states that offers will be evaluated from a "technical standpoint", the FAA failed to include the appropriate technical criteria rating plan. The solicitation is defective, and should be amended accordingly.

B. Since the solicitation Clause 3.2.2.3-19-A states that the "best value" is the basis for source selection, the FAA failed to state the appropriate technical evaluation factors in

the solicitation. The solicitation is defective, and should be amended accordingly.

C. The solicitation is ambiguous since the FAA will conduct a best value analysis but the solicitation fails to state the technical criteria. The solicitation is defective, and should be amended accordingly.

D. The FAA has set forth two inconsistent evaluation schemes in the solicitation, best value and low price technically acceptable methods of evaluation. See Contracting Officer's statement above, last sentence. A solicitation that provides for evaluation and award on both a best value basis and a low-priced, technically acceptable basis contains a patent ambiguity, thus making the solicitation defective on its face. See, e.g., 841 Associates, L.P.; Curtis Center Limited Partnership, B-257863, B-257863.2, November 17, 1994, 94-2 CPD ¶ 193.^[6]

Protest Complaint at 4-5.

The allegation in paragraph A of this basis of protest has been answered in the discussion of the first ground of protest. There was no requirement that the solicitation include technical evaluation criteria, and the contracting officer advised offerors that if no technical criteria were provided, the award would be made to the lowest responsible offeror. The solicitation was not defective as alleged by protester.

With regard to the allegation in paragraph B of this basis of protest, protester asserts that solicitation clause 3.2.2.3-19-A requires a statement of appropriate technical evaluation factors in the solicitation, because it states that best value is the basis of source selection. The clause reads as follows:

The Government will award a contract resulting from this Screening Information Request (SIR) to the responsible offeror whose submittal conforming to the SIR will, at the discretion of the source selection official, be the best value to the FAA considering the technical, cost/price, and other criteria in the SIR.

Finding 3.

However, the contracting officer stated with regard to best value:

Best value to the Government would be based on technical (if the solicitation included a technical rating criteria and the offerors were given position placement based on this criteria,) then cost/price best value would be looked at with regard to the offerors proposal, along with the offerors expertise, etc. If the SIR does not call for technical criteria, then normally the award would be based on the lowest responsible offer.

Thus, according to the contracting officer, if no technical criteria are included, the award would be made on the basis of the lowest price and offeror responsibility. As there are no technical evaluation factors in the solicitation, there is no best value determination to be made.

With regard to the allegation in paragraph C, I find that the solicitation is not ambiguous. The contracting officer clearly responded that if the SIR does not call for technical criteria, the award would be based on a determination of the lowest responsible offer, which it was. Accordingly, the allegation in paragraph D, that the solicitation contains two inconsistent evaluation schemes, lacks merit.

Accordingly, I recommend that the second basis of protest be denied.

Recommended Decision

There was no requirement that the solicitation contain technical evaluation criteria. The offerors were informed of the basis of award in the solicitation and in Amendment 0001. The solicitation was neither ambiguous nor defective. The award was made to the lowest priced responsible offeror. I recommend that the protest be **DENIED**.

_____/s/_____

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ALLAN H.
GOODMAN

Board Judge